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February 18, 2000

VIA MESSENGER

Magalie Roman Salas
Secretary
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A35
Washington, D.C. 20554

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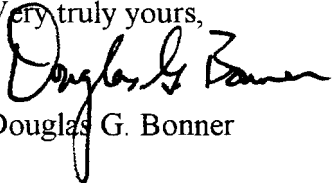
RE: *In re: Applications of SPRINT CORPORATION, Transferor, and MCI WORLDCOM, INC., Transferee, for Consent to Transfer Control, et. seq. – CC Docket No. 99-333*

Dear Ms. Salas:

Enclosed for filing are an original and four (4) copies of the Initial Comments of MGC Communications, Inc. on the Application For Consent To Transfer Control jointly filed by Sprint Corporation and MCI Worldcom, Inc.

Please date-stamp the enclosed extra copy of this filing and return it to the messenger in the envelope which is provided. If you have any questions concerning this filing, please do not hesitate to contact me.

Very truly yours,


Douglas G. Bonner

Enclosures

cc: International Transcription Service, Inc.
Lauren Kravetz, Wireless Telecom. Bureau
Christopher Libertelli, Common Carrier Bureau (6 copies)
Matthew Vitale, International Bureau
Jim Bird, Office of General Counsel
A. Richard Metzger, Jr., Counsel for MCI WorldCom, Inc.
Philip L. Verveer, Counsel for Sprint Corporation

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re Applications of)
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SPRINT CORPORATION,)
)
Transferor,)
)
and)
)
MCI WORLDCOM, INC.)
)
Transferee,)
)
)
for Consent to Transfer)
Control of Corporations Holding)
Commission Licenses and Authorizations)
Pursuant to Section 214 and 310(d) of the)
Communications Act and)
Parts 1, 21, 24, 25, 63, 73, 78, 90, and 101)
)

CC Docket No. 99-333

INITIAL COMMENTS OF MGC COMMUNICATIONS, INC.

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February 18, 2000

I. APPROVAL OF THIS TRANSFER APPLICATION, WITHOUT CONDITIONS RECONCILING THE TWO APPLICANTS' DIVERGENT POLICIES CONCERNING PAYMENT OF CLEC ACCESS CHARGES, WOULD NOT SERVE THE PUBLIC INTEREST.

In order for this Commission to grant the pending applications under Sections 214 and 310(d) of the Communications Act, 47 U.S.C. §§ 214 and 310(d) for approval to transfer control of licenses and authorization controlled or requested by Sprint Corporation and its subsidiaries and affiliates ("Sprint") to MCI WorldCom, Inc. ("MCI WorldCom"), the Applicants collectively "must demonstrate that their proposed transaction will serve the public interest, convenience and necessity."^{1/} This is the test that the Commission recently applied in approving the SBC merger with Ameritech, but only after concluding that approval was in the public interest because approval was subject to "significant and enforceable conditions designed [in part] to mitigate the potential public interest harms of their merger...."^{2/}

MGC urges the Commission not to approve this merger without some express conditions which at a minimum include: (1) the combined entity's commitment to pay validly tariffed switched access services that the combined entity (or either of the Applicants that make up the combined entity) has received from MGC or any other local exchange carrier; (2) specific and escalating forfeiture amounts being adopted for which the Applicants will be liable if they decline to fully pay for validly tariffed switched access services which they receive in the future.

MGC has firsthand experience providing access services to both MCI WorldCom and to Sprint. MGC is a leading facilities-based integrated service provider of local and long distance

^{1/} *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141 (released Oct. 8, 1999), FCC 99-279 ("SBC-Ameritech Order") at 5.

^{2/} *Id.*

voice and data services to small and medium-sized business and residential customers in five (5) states. Two of these states where MGC already operates are Nevada and Florida, where Sprint's local telephone companies have the highest concentration of access lines, and where MGC is a leading competitor with Sprint in multiple product markets.^{3/} MGC is currently authorized to provide local and/or long distance services in at least ten (10) states, and has pending applications for certification in fourteen (14) states. MGC has begun plans to enter twenty (20) additional local markets by October, 2000. It currently has deployed seven (7) switches and over three hundred (300) incumbent local exchange carrier ("ILEC") central office collocations.

MGC currently competes with five ILECs in markets where U.S. consumers now have the opportunity to benefit from the Telecommunications Act of 1996's promise of local competition. One such market is Sprint's ILEC service area in Las Vegas, Nevada, where MGC is Sprint's leading facilities-based competitor.^{4/} MGC has undertaken substantial risk and expense to build a facilities-based local exchange network that offers consumers a true alternative to their incumbent local provider. MGC undertook this investment risk in part on the

^{3/} See, Application For Consent to Transfer Control at 25. "The Sprint local telephone companies serve approximately 7.9 million access lines in 18 states (approximately 5% nationally)... The majority of Sprint's access lines (about 55%) are in Florida, Nevada, and North Carolina." *Id.* at 8, 25. Sprint is the "sixth largest operator of local telephone companies in the United States. . . ." *Id.* at 25. In addition to its nearly 8 million local access lines, Sprint "serves more than 20 million residential and business customers" and "earned \$17 billion in 1998 revenues." *Id.* at 8. If this merger is approved, using the Applicants' own figures, the combined entity will control more than a 36% share of the domestic long distance market, excluding LEC toll revenues (principally, intrastate, intraLATA toll revenue). *Id.* at 40-41 citing Trends in Telephone Service (Sept.1999), Table 11.3.

^{4/} Curiously missing from the Application's description of Sprint's service areas, which chooses to emphasize Sprint's ILEC territories as "suburban areas and rural communities," *see* Application at 25, is its crown jewel of ILEC territories in terms of revenues, the greater metropolitan Las Vegas, Nevada area. Las Vegas, Nevada has been generally recognized as one of the fastest growing cities in the U.S. over the past decade.

understanding that it could recover its reasonable, cost-based access charges. A portion of its expense in building and operating its network is recovered by MGC through interstate access charges to IXCs that utilize MGC's local exchange network facilities.

Unfortunately, some larger IXCs have chosen unilaterally not to pay MGC's properly tariffed interstate access charges.^{5/} As the Commission has recently ruled in a controlling decision, refusal to pay for CLEC access services is an exercise of "impermissible self-help and a violation of Section 201(b) of the Act."^{6/}

Yet Sprint, the third largest IXC in the United States, continues to defiantly flout Section 201(b) of the Act, and Commission orders requiring the payment of tariffed access charges. For over eighteen (18) months – since August 12, 1998 – SPRINT has refused to pay MGC for switched access services that it has received from MGC.^{7/} As of January 4, 2000, MGC is owed

^{5/} MCI WorldCom, unlike Sprint, has not refused to pay MGC and other CLEC access charges. The fact that MCI WorldCom has reached agreement with MGC for payment of interstate access services that it receives makes Sprint's continued refusal to pay validly tariffed access charges all the more disturbing. This is particularly troubling since Sprint has insisted on litigating this issue since the November 17, 1999 Application for Consent to Transfer Control was filed, notwithstanding controlling decisions of the Common Carrier Bureau and the full Commission in July and December 1999. See, n.6 *infra*. The Commission must consider in this context whether the proposed merger of the second and third largest domestic IXC (and sixth largest ILEC) will have anticompetitive effects and result in increased discrimination against competitors. *See*, SBC-Ameritech Order at 31, paras. 56-57 (concluding that the proposed merger between SBC and Ameritech (1) "significantly decreases" the potential for competition in local telecommunications markets "by large incumbent LECs" and (2) would have an "adverse impact" on the ability of regulators and competitors to implement the goals of the 1996 Act by nonregulated means.)

^{6/} *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd. 11647 (Comm. Car. Bur. rel. July 16, 1999)("AT&T Bureau Order"), *aff'd*, Memorandum Opinion and Order, File No. EAD-99-002 (rel. December 28, 1999)("AT&T Commission Order") ("[W]e affirm the Bureau's ruling that AT&T is liable to MGC, at MGC's tariffed rate, for the originating access service that AT&T received after August 22, 1998.") The Commission affirmed the Bureau's award of stipulated damages of \$1,966,240.07. AT&T Commission Order at 5.

^{7/} *See*, August 12, 1998 letter of Gary Lindsey, Director, Sprint-Access Verification, to Darren Adair, Controller, MGC Communications, Inc. (Exhibit A).

\$5,138,496.64 in unpaid access charges that MGC has billed to Sprint for services that Sprint has used to provide interexchange services to its own customers. See, Exhibit B. Sprint, as the nation's third largest IXC and sixth largest ILEC, is clearly attempting to bully its smaller competitor, MGC, by receiving services and willfully refusing to pay for them. This has severe anticompetitive consequences, by essentially requiring a competitor to subsidize Sprint's long distance operations while at the same time attempting to weaken its CLEC competitor in Sprint's Nevada and Florida local markets.^{8/} MGC is not unique in this position. As of September 1999, Sprint admits that it had open disputes with more than twenty-four (24) CLECs and that its disputes with CLECs is growing by two to three CLECs per month.^{9/} Sprint admits that the total amount in dispute as of September was \$15.5 million and this amount was increasing at the rate of \$2.3 million per month.^{10/}

On December 9, 1999, MGC filed a Formal Complaint against Sprint with the Commission under Section 1.720 of the Commission's Rules (47 C.F.R. § 1.720 *et seq.*) seeking recovery of payment for tariffed access charges that it is owed by Sprint since August, 1998.^{11/}

^{8/} Sprint has aggressively raised concerns about ILEC incentives to engage in *potentially* discriminatory conduct of denying or degrading terminating access to independent IXCs. *See*, SBC-Ameritech Merger Order at ¶¶ 216-217. However, Sprint's *actual* conduct in refusing to compensate CLECs for valid tariffed access rates is not potentially discriminatory, it is discrimination in fact.

^{9/} Sprint Initial Comments, *In the Matter of Access Charge Reform*, CC Docket No. 96-98, *Fifth Report and Order and Further Notice of Proposed Rulemaking* (FCC 99-206, rel. Aug. 27, 1999) ("*Access Charge Reform*"), at 15-17; *see also*, Reply Comments of the Association for Local Telecommunications Services, *Access Charge Reform*, at 17.

^{10/} *Id.* At this pace, using Sprint's own estimate, by the end of February 2000, Sprint will have accumulated approximately \$27 million in CLEC tariffed access charges that it is unilaterally refusing to pay through unlawful self-help measures.

^{11/} *In the Matter of MGC Communications, Inc. v. Sprint Communications Company, L.P.*, File No. EB-99-MD-033 (Filed December 9, 1999). Only after MGC filed its complaint against Sprint to recover unpaid access charges did Sprint move forward with a recently filed Section

Sprint has refused to pay for tariffed CLEC services that it benefits from by unlawful use of self help measures, rather than paying validly tariffed charges and promptly pursuing its lawful remedy, a Section 208 complaint. MGC has attempted to but failed to negotiate a switched access agreement with Sprint because Sprint simply refuses to consider agreeing to any switched access rate that is above the ILEC rate.^{12/} As the Commission has squarely held, "a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed, but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations."^{13/}

208 complaint against MGC. *See, In the Matter of Sprint Communications Company, LP v. MGC Communications, Inc.*, File No. EB-99-MD-033 (filed January 11, 2000). The two complaints have been consolidated in one Commission docket ("MGC-Sprint Complaint").

^{12/} MGC Comments at 25-26. Quite simply, in MGC's experience the large IXCs have no incentive to negotiate with CLECs. *Id.* at 26. As the Applicants argue, "local access represent[s] a substantial portion of long distance costs." Application at 19. The Applicants state that the goal of the merger is to promote the new company's ability to compete with ILECs for local services by more fully utilizing MCI WorldCom's local facilities by directing their combined long distance customers to MCI WorldCom's local networks. *Id.* at 23. According to the Applicants, the "long distance customers of the two companies are more likely also to purchase local services from them, thus increasing the likelihood of success in competing locally and reducing customer acquisition costs." *Id.* Quite clearly, this means that the combined company will be competing not only with large ILECs but also with smaller CLECs such as MGC. While MGC welcomes competition on a level playing field, even against larger IXCs such as Sprint and MCI WorldCom, these companies cannot be allowed to merge to become more powerful if anticompetitive and unlawful policies like Sprint's in refusing to pay valid CLEC tariff charges are allowed to continue. Sprint and MCI WorldCom must agree as a condition of any merger approval that they will immediately pay valid CLEC charges that are outstanding, and will continue to pay any lawful tariff charges as required under legally effective CLEC access tariffs.

^{13/} *Affinity Network, Inc. v. AT&T*, 7 FCC Rcd 7885 (1992); *see also, Communique Telecom., Inc. d/b/a LOGICALL*, 10 FCC Rcd 10399 (1995) (customers who claim that tariff rates are unreasonable may file Section 208 complaints with the Commission, "but may not automatically withhold payments of legally tariffed charges merely by asserting that the rates are unreasonable.")

Sprint's anticompetitive intent is further evidenced by its failure to undertake any steps to discontinue beneficial use of MGC's services.^{14/} As the full Commission concluded in its recent December 28, 1999 reconsideration Order in the factually similar *AT&T Corp.* case, AT&T "made no attempt to inform the shared customers that AT&T no longer would provide their interexchange service." The Commission viewed AT&T's failure to contact its shared customers with MGC "as especially damaging to its position in this matter." The Commission concluded that AT&T's attempt to terminate its access arrangement with MGC in such a way as not to assume the burden of contacting its own shared customers to whom it is providing IXC services, was an "unjust and unreasonable" practice.^{15/} Similarly, Sprint advertises and directly solicits long distance customers from among MGC's local service customers in MGC's service territory, and has not attempted to block traffic to Sprint's network originating from MGC's territory.^{16/} Thus, Sprint benefits from MGC's switched access services, and bills and collects for long distance services from MGC local customers, but fails to pay MGC for its lawful tariffed charges in providing necessary access services.^{17/}

^{14/} "Sprint Com. continues to receive long distance traffic from MGC and continues to send long distance traffic to MGC for termination." *See*, January 10, 2000 Joint Statement filed pursuant to 47 C.F.R. §§ 1.732(h), 1.733(b)(1) & (2), Stipulated Facts, at 2, IV.E., MGC-Sprint Complaint.

^{15/} AT&T Commission Order at 3, ¶7.

^{16/} MGC Formal Complaint at 9.

^{17/} Sprint's essential excuse for exercising unlawful self-help is its indefensible position that all CLECs must be required to charge rates that do not exceed the switched access rates of RBOCs, the largest local telephone companies in the U.S., irrespective of the relative underlying cost characteristics. Sprint Comments, *Access Charge Reform*, at 21-22. As opposed to Sprint's doctrinaire refusal to pay access charges that are higher than RBOC rates, MCI WorldCom has more reasonably acknowledged that NECA rates, which include seven rate bands for end office switching and four rate bands for switched transport, might be a useful benchmark to determine if CLEC access rates are reasonable. MCI WorldCom Comments, *Access Charge Reform* at 21-22. Economy of scale is critical to understanding the relative switching costs of different

II. SPRINT AND MCI WORLDCOM MUST EITHER AGREE TO OR SUBMIT TO REASONABLE CONDITIONS CONCERNING PAYMENT OF OUTSTANDING AND FUTURE CLEC ACCESS CHARGES FOR THIS TRANSFER APPLICATION TO BE APPROVED.

As MGC has demonstrated, it has already been harmed by the actions of major IXC's such as Sprint in exercising impermissible self help by refusing to pay lawful MGC tariffed charges for interstate switched access. Allowing the second and third largest of these major IXC's (and sixth largest ILEC) to merge will increase the combined company's incentives to continue Sprint's policies of refusal to pay CLEC access charges. As their business plan calls for aggressive entry into local markets to avoid payment of access charges "off-net", incentives will be greater than they already are today to minimize local access costs, as long distance giveaways are used as teasers to lure customers with bundled local, long distance and internet access services.^{18/}

carriers. As the Commission has long recognized, other things being equal, larger carriers will typically have lower switching costs per unit because they enjoy a greater economy of scale. *National Exchange Carrier Association, Inc. Proposed Modifications to the 1998-99 Interstate Average Schedule Formulas*, 13 FCC Rcd 24225, 1998 FCC LEXIS 6539 (Dec. 22, 1998) at n. 6. As the Commission concluded in its recent *UNE Remand Order*, "a competitor's switching costs per minute at a 10% penetration level are slightly more than twice the cost of an incumbent LEC serving the remaining 90% of the market with its own switch." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (FCC 99-238, rel. Nov. 5, 1999) at ¶ 260. As MGC and ALTS have argued in their recent Comments filed in response to the *Fifth Report and Order* in the *Access Charge Reform* Docket, CLECs simply have higher switching costs than larger, more established ILECs such as the RBOCs. *See, e.g.*, ALTS Reply Comments at 23. That will continue until CLECs make additional gains in local exchange market share. MGC Comments, *Access Charge Reform* at 5. MGC's access charges are set at reasonable cost-based levels and will inevitably decline as local competition develops. *Id.* at 6.

^{18/} Therefore, MCI WorldCom written assurances to comply with the law, "while reserving all legal rights" of the combined company do not offer adequate mitigation against future harm to CLECs from lost revenue to date and continuing lost revenue due to impermissible self help by major IXC's such as Sprint. While MCI WorldCom is the acquiring company in this merger, it is not uncommon for the acquiring company to take on the attributes of the acquired company. While MCI WorldCom has historically been a strong competitive influence in interexchange and

The Commission has employed a "comparative practices" analysis in the past to evaluate potential public interest harms in connection with telecommunications mergers,^{19/} and this application should be no exception. The Commission's public interest test "considers, among other things, whether the merger...would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy."^{20/} Thus, just as SBC and Ameritech committed in their merger to implement the "best practices" of the other,^{21/} MGC urges the Commission to insist that the combined company adopt MCI WorldCom, Inc.'s (the transferee) "best practice" of payment of CLEC access charges and not exercising impermissible self-help. Specifically, the applicants must agree to make CLECs such as MGC whole for all outstanding tariffed access charges that have been properly billed to Sprint for services that Sprint has been provided, and pay any tariffed late charges. Secondly, the Applicants must agree

local numbers, if this merger is approved, it will become the sixth largest ILEC serving 8 million access lines in 18 states. It remains to be seen how MCI WorldCom will respond post-merger to its new role of incumbent local monopoly. Any merger approval must be conditioned upon the Applicants' committing to make CLECs whole for all unpaid access charges, and to comply with their payment obligations on a continuing basis. The wrong signal will be sent to these and future merger candidates if generic, unjust and unreasonable practices in violation of the Communications Act and Commission orders are allowed to continue without being addressed as part of the Commission's public interest review.

^{19/} See SBC-Ameritech Order at 51, 85.

^{20/} *Id.* at 51, ¶102. Certainly, as with the reduction in the number of incumbent LECs in past major incumbent LEC mergers, consolidation of the "Big Three" major IXCs to two major IXCs will also impede the ability of the Commission and state regulators and competitors to "make effective benchmark comparisons, which would force more intrusive, more costly, and less effective regulatory measures contrary to the 1996 Act's deregulatory aims and the interests of both the regulated firms and taxpayers." *Id.* at 52, ¶204.

^{21/} For example, as one condition for their merger approval, Ameritech agreed to provide shared transport in Ameritech territory, which it had "vigorously resisted implementing in the past," but which SBC had already implemented in Texas. *Id.* at 182, ¶425. Similarly, SBC departed from its opposition to the requirement of a separate advanced services affiliate, agreeing to adopt Ameritech's approach to advanced services. *Id.* at 183, ¶425.

on a going-forward basis not to exercise impermissible self help by refusing to pay tariffed CLEC access charges. Finally, the Commission should adopt and enforce as a condition for approval concrete forfeiture procedures (i.e. treble damages for unpaid tariffed access charges) to serve as an incentive for the combined company not to exercise impermissible self-help in refusing to pay tariffed CLEC charges.^{22/}

III. CONCLUSION

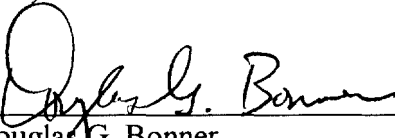
For the foregoing reasons, MGC submits that the application does not meet the Commission's public interest test unless substantial conditions are imposed by the Commission to address Sprint's failure to comply with the Communications Act and established Commission policy and orders, including in *MGC Communications v. AT&T Corp.*, Memorandum Opinion and Order, File No. EAD-99-002 (rel. Dec. 28, 1999), regarding payment of tariffed CLEC access charges. The Applicants must be required to comply with the Commission's *AT&T Corp.* decision as a condition for the merger being approved, including payment by Sprint of all unpaid tariffed CLEC access charges through the date of final Commission decision on this Application. MCI WorldCom, Inc.'s best practice of payment of CLEC access charges must be formally agreed to by Sprint, and by any merged company on a prospective basis. MGC and other CLECs must be made whole for Sprint's refusal to pay substantial sums of money that are lawfully due,

^{22/} See MGC Comments, *Access Charge Reform*, at 26-29; ALTS Reply Comments, *Access Charge Reform*, at 26 ("The Commission should declare that it will apply major forfeitures to IXCs that attempt to engage in self-help remedies such as unilateral refusal to pay lawfully tariffed CLEC access charges. . . .").

with a commitment that no further unlawful self help will be undertaken by either Applicant or a future combined company.

Respectfully submitted,

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Attorneys for MGC COMMUNICATIONS, INC.

February 18, 2000

A



**Gary Lindsey, Director
Sprint- Access Verification
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Phone: (816) 501-8508
Fax: (816) 501-8516**

August 12, 1998

Darren Adair, Controller
MGC Communications, Inc.
3301 N. Buffalo Drive
Las Vegas, NV 89129

Dear Mr. Adair:

This communication is intended to make you aware of Sprint's deep concern regarding the patently excessive level of MGC's access charges in Las Vegas. MGC's current access rates are several times those of the incumbent LEC serving the Las Vegas area. Sprint believes these excessive access charges are wholly unjustifiable and we will withhold payment, both on a going-forward basis, and for past bills MGC has rendered, the difference between MGC's rates and those of the ILEC serving Las Vegas in the NPA NXXs in question. Attachment 1 reflects these NPA NXX's and Attachment 2 calculates all disputed items including the rate differential.

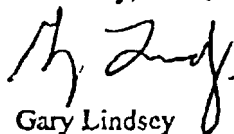
The FCC has indicated that ILEC access charges are the appropriate benchmark for use by CLEC's, such as MGC. In that regard, the FCC (specifically in the context of terminating access charges) stated in Paragraph 364 of its May 16, 1997 Access Reform Order, that "terminating rates that exceed those charged by the incumbent LEC serving the same market may suggest that a competitive LEC's terminating access rates are excessive." In the same order (Paragraph 363) the FCC "emphasize[d] that we will not hesitate to use our authority under section 208 to take corrective action where appropriate."

An additional item to note is the age of backbilling of usage charges. We will allow the ten months of backbilling for this event, recognizing your start up operation. However, similar to agreements we have with other LEC's, we expect timely billing and will not pay any charges backbilled in excess of 120 days (current billing plus three months).

Sprint is willing to resolve this issue without resorting to filing a formal complaint with the FCC, and to this end, we request that you call to set up a mutually convenient time with the next two weeks to discuss this matter.

Sprint looks forward to hearing from MGC soon on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Lindsey", written over the printed name.

Gary Lindsey

B

MGC Communications, Inc.
Sprint Payment Schedule
Billings from July 1997 - November 1999
Payments as of January 4, 2000
Summary - All Regions

Region	Amount Billed	Amount Paid	Balance Due MGC
Las Vegas			
Total Billings Las Vegas	4,039,774.22	388,827.72	3,650,946.50
Region 10 - ONT, LGB, SAN			
Total Billings Region 10	1,041,079.53	75,318.26	965,761.27
Atlanta			
Total Billings Atlanta	464,675.05	47,859.68	416,815.37
Chicago			
Total Billings Chicago	76,691.96	11,387.43	65,304.53
Ft. Lauderdale			
Total Billings Ft. Lauderdale	55,980.75	16,311.78	39,668.97
TOTAL ALL REGIONS			
Total All Regions	5,678,201.51	539,704.87	5,138,496.64